

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE)	
)	
MAXIE J. HARRIS and)	
LOIS LORRAINE HARRIS,)	
)	Case No. 99-20342
)	
Debtors.)	MEMORANDUM OF DECISION,
)	AND ORDER
_____)		

HONORABLE TERRY L. MYERS, U.S. BANKRUPTCY JUDGE

Patricia L. Evans, Orofino, Idaho, for Debtors.

Gary L. McClendon, Boise, Idaho, for the United States Trustee.

S. David Swayne, Moscow, Idaho, Trustee.

On March 29, 1999, Maxie and Lorraine Harris ("Debtors") filed their voluntary chapter 7 petition for relief, together with their schedules and statements. On July 28, the United States Trustee ("UST") filed a motion to dismiss the case pursuant to § 707(b).

The motion was heard on August 17, and evidence was submitted. The Debtors and UST have briefed the substantive issues under § 707(b) in light of that evidence. However, the Court has since hearing discerned an issue, not addressed by the parties, which eliminates the Court's ability to reach the merits of the motion.

The time to file a motion to dismiss pursuant to § 707(b) is governed by Fed.R.Bankr.P. 1017(e) which provides:

(e) Dismissal of Individual Debtor's Chapter 7 Case For Substantial Abuse. An individual debtor's case may be dismissed for substantial abuse pursuant to § 707(b) only on motion by the United States trustee or on the court's own motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and such other parties in interest as the court directs.

(1) A motion by the United States trustee shall be filed no later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a), unless, before such time has expired, the court for cause extends the time for filing the motion. The motion shall advise the debtor of all matters to be submitted to the court for its consideration at the hearing.

(2) If the hearing is on the court's own motion, notice thereof shall be served on the debtor not later than 60 days following the first date set for the meeting of creditors pursuant to § 341(a). The notice shall advise the debtor of all matters to be considered by the court at the hearing.

In this case, the § 341 meeting of creditors was first set for, and actually held on, May 25, 1999. The 60th day after this meeting fell on Monday, July 26, 1999. See, Rule 9006(a). The UST's motion filed on July 28, 1999, was therefore, untimely.¹

¹

The Court notes that the UST's motion was signed and served on July 26, but

Rule 1017(e)(1) is written in a mandatory fashion, i.e., the motion “shall be filed no later than 60 days” The time limit is not phrased in a permissive or discretionary manner. It may be extended only on request made before the time has expired. Rule 1017(e)(1); Rule 9006(b)(3). No such request, timely or otherwise, was made here.

Though a 60 day time limit might seem to some unduly short, and its rigidity unduly harsh, it is little different than the time bar for filing dischargeability actions under § 523(c) and Rule 4004(a) and (b).

The Advisory Committee Note to Rule 1017(e) explains:

Subdivision (e) is amended to conform to the 1986 amendment to § 707(b) of the Code which permits the United States trustee to make a motion to dismiss a case for substantial abuse. The time limit for such a motion is added by this subdivision. In general, the facts that are the basis for a motion to dismiss under § 707(b) exist at the time the case is commenced and usually can be discovered early in the case by reviewing the debtor's schedules and examining the debtor at the meeting of creditors. Since dismissal for substantial abuse has the effect of denying the debtor a discharge in the chapter 7 case based on matters which may be discovered early, a motion to dismiss under § 707(b) is analogous to an objection to discharge pursuant to Rule 4004 and, therefore, should be required to be made within a specified time period. If matters relating to substantial abuse are not discovered within the time period specified in subdivision (e) because of the debtor's false testimony, refusal to obey a court order, fraudulent schedules or other fraud, and the debtor receives a discharge, the debtor's conduct may constitute the basis for revocation of the discharge under § 727(d) and (e) of the Code.

On the record in this case, the Court finds no basis to conclude that the Rule shouldn't be enforced as written.

the Rule requires that it be timely “filed” which did not occur here.

CONCLUSION AND ORDER

The motion of the U. S. Trustee to dismiss this case under § 707(b) is DENIED on the ground that such motion was untimely filed under Rule 1017(e)(1).

Dated this 29th day of September, 1999.